IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date: 22nd NOVEMBER 1995.

CRIMINAL APPEAL NO. 839 OF 1987

Date of Approval

THE HON'BLE MR. JUSTICE A.N.DIVECHA,
AND
THE HON'BLE MR. JUSTICE H.R.SHELAT,

1. Whether Reporters of Local Papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Mr.M.J.Budhbhatti, Advocate for the appellants.

Mr.S.R.Divetiya, AGP for the respondent.

CORAM: A.N.DIVECHA & H.R.SHELAT,JJ.
DATE; 22nd NOVEMBER, 1995.

ORAL JUDGMENT;- (PER H.R.SHELAT,J)

1. The appellants came to be convicted of the offences under Secs.302, 323, 324, read with Secs.149, and 148 of Indian Penal Code, and Sec.135 of Bombay Police Act, by the then learned Sessions Judge at Amreli, in Sessions Case No.47 of 1986, on 2nd September, 1987, and therefore, the present appeal has been filed by the appellants.

2. Samat Laghra- appellant no.1 and deceased Varsing Laghra were brothers. Both were dealing in bullocks. The appellants nos.2 to 5 are the sons of appellant no.1. On 1st September 1987 for the purpose of selling the

bullocks, Varsing Laghra, the deceased, his son Beeju Varsing and another son Bavuk Varsinh, and Bai Raju, wife of Beeju Varsing had gone to Karkoliya. After the deceased returned selling some of the bullocks, all were sleeping in the compound of the school. It is the prosecution case that about 2-00 a.m. on 2nd September 1987, the appellants assaulted them and caused fatal injuries to Varsing Laghra. The appellant no.1 was armed with an axe, appellant no.2 with an axe, appellant no.3 with a stick, appellant no.4 with a scythe and appellant no.5 with a spear. They were giving blows with the weapons they were having. Varsing Laghra started to shout. Hearing his shrieks, his sons with his daughter -in-law woke up. They could also see that the appellants were giving blows to Varsing Laghra. In order to save Varsing, they also intervened. The appellants then caused injuries to Beeju Varsing and Bavuk Varsing. Bai Raju Beeju also tried to save them but she was pushed off. Masaribhai Lakhabhai and Oghadbhai Desabhai, hearing shouts, rushed to the place of the incident. Seeing them coming, the appellants left the place with the weapons they were having. Kanabhai and Merambhai were called, and by their cart, all the three injured were taken to the dispensary at Lathi. The Doctor examining, gave them preliminary treatment. Finding the case serious, for better treatment, all the three injured were referred to the hospital at Amreli. During the course of the treatment at Amreli, Varsing Laghra died. A complaint was then lodged before Amreli Police Station, which was later on sent to Lathi Police Station for necessary investigation, as the case was falling within the jurisdiction of Lathi Police Station. At the conclusion of the investigation, the Police filed the chargesheet in the Court of the Judicial Magistrate (First Class) at Lathi. The learned Magistrate was not competent to hear and decide the case. He committed the case for trial to the Court of Sessions at Amreli. It came to be registered as Sessions Case No. 47 of 1986. A charge of the offences under Secs. 147, 148, 302, 323, 324 read with Sec.149 of Indian Penal Code, and Sec.135 of Bombay Police Act was framed, because it was alleged by the prosecution that the appellants formed an unlawful assembly the common object of which was to cause grievous hurt to Varsing, Beeju, and Bavuk and others, and, if necessary to kill Varsing. Knowing fully well about common object they joined the same armed with deadly weapons, and not only they ran riot with the weapons they were having, but intentionally caused fatal injuries sufficient in ordinary course of nature to cause death of Varsing Laghra, and thereby intentionally caused his death and voluntarily caused hurt to Beeju Varsing and

Bavuk Varsing. The appellants pleaded not guilty to the charge and claimed to be tried. The prosecution adduced necessary evidence. Considering evidence on record, the learned Judge below reached the conclusion that the prosecution had beyond reasonable doubt established the charge levelled against the appellants. With the result, each of the appellants came to be convicted of the offences under Secs. 302, 324 and 323 read with Sec. 149 of Indian Penal code, and was sentenced to life imprisonment for the offence under Sec.302 read with Sec.149 Indian Penal Code, six months imprisonment, for the offence u/s. 324 read with Sec.149, while for the offence under Sec. 323 read with Sec.149 of Indian Penal Code, each one was sentenced to three months imprisonment. As they committed the breach of the notification issued by the District Magistrate prohibiting the possession and holding of the weapons, they were also held guilty of the offence punishable under Sec.135 of the Bombay Police Act and each of them was convicted of the offence punishable under Secs. 147, and 148 of Indian Penal Code, but no separate sentence in that regard was passed. Being aggrieved by such judgment and order , the present appeal has been preferred before us.

3. Mr.Budhbhatti, the learned advocate appearing on behalf of the appellants, assailed the judgment and order pointing out infirmities in the evidence led by the prosecution, and showing how the learned Judge below misconstrued the evidence. According to him, the case was concocted because of abhorrence and hostility. There was no justification to hold the appellants guilty as the evidence of the eye witnesses and the witnesses who supported them was highly doubtful. Mr. Divetia, the learned APP representing the respondent supported the judgment and order of the lower court. There was no infirmity in the evidence, it was credible, and there was no just cause to find fault with. The injured would not tell a lie. After being convicted, the appellants were shedding crocodile-tears so as to have unjust emancipation.

4. We have with great care gone through the entire evidence on record and even made several queries to both advocates representing the parties for just determination. Considering the evidence on record, we find that the prosecution has failed to establish the charge beyond reasonable doubts. No doubt, Beeju Varsing (Ex.23), Bavuk Varsing (Ex.24), and Rajuben Savaji (Ex.25) have supported the case of the prosecution without missing material aspects. Masaribhai Lakhabhai

(Ex.30) who is said to have rushed to the place of offence hearing the shouts, not only saw the injuries on the persons of Varsing Beeju and Bavuk, but also saw the appellants running away from the place of offence with the weapons. If the evidence of these witnesses, without any comment, is accepted on its face value, certainly one would be led to accept the case of the prosecution and hold that the charge is established, but on searching scrutiny inherent improbabilities emerging on record and giving fatal blow to the prosecution cannot be overlooked. The evidence of the doctors viz. (1) Dr.K.J.Nandoliya (Ex.16), (2) Dr.Dipaben M.Jaipal (Ex.12), and (3) Dr. G.K.Parmar (Ex.19), supports the case of injuries and cause of death. Keeping the doctors' evidence in mind what can be deduced from the evidence of the above- referred witnesses is that some incident happened and Varsing, Beeju and Bavuk sustained injuries, but Varsing later on during the course of treatment succumbed to the injuries. However it is difficult to have the answer free from doubt as to who the wrongdoers are!

5. All have categorically made the statements that Varsing Laghra after sustaining injuries fell down in the compound of the school where he was sleeping and he was profusely bleeding. Astonishingly we note that no blood marks were found by the Police when the Panchnama of the scene of offence was being drawn. The Police found the blood marks on the road, outside the school compound. It is not explained by the prosecution how the blood marks were found on the road and not in the school compound where, in profusely bleeding condition, the deceased had fallen down. If at all, the deceased in order to save himself tried to run away, trail of blood would have been found between the place of attack and the road on which some blood marks were found; but that was also not found by the Police. The fact about finding of the blood at the place other than the place of attack is not explained and that the blood though ought to have been found, but not found where the deceased fell down in the school compound, it is the strongest circumstance on record going to discredit the truth of the case of the prosecution, and therefore, without independent cogent and convincing evidence we do not think it just, proper and safe to place reliance on the evidence of the eye witnesses, namely Beeju Virsing (Ex.23), Bavuk Varsing (Ex.24) and Rajuben Savaji (Ex.25), and that of Masri Lakha (Ex.30), supporting them. At this stage, we think it proper to refer to two authorities throwing light on the proposition. It is held in the case of Miran Bux Vs. Laloo @ Shagir Ahmad, 1993(2) Crimes 1167: "No blood was

found either in the shop or near the shop. All other eye witnesses deposed to same effect. Version in F.I.R. as well repeated by witnesses was rightly held unreliable". What is likewise held in the case of Bir Singh & Others Vs. The State of U.P. 1977 Cri.L.R. 385 (SC) is:..." but the fact remains that the prosecution has not been able to show that there was any blood at the place where P.W.2 fell down which raises a reasonable inference that P.W.2 may have been assaulted elsewhere and once that is so then the case regarding the assault of the deceased at the place of occurrence also automatically fails because the two incidents are parts of the same transaction". The law made clear and the view taken in the above two decisions fortify our view herein above. The say of the prosecution, therefore, cannot be accepted.

6. Evidence of Masri Lakha (Ex.30) is successfully assailed by the learned advocate representing the appellants. Beeju Varsing who lodged the complaint, stated before the Court that Masari and Oghad hearing their shouts had arrived to the scene of offence and thereafter the appellants ran away. It is pertinent to note that, when the complaint Ex.37 was lodged before the Police, names of Masari and Oghad were not mentioned. On the contrary, it is stated that Kanabhai and Jorabhai had rushed to the scene of offence. When the names of Masari and Oghad are not mentioned, and the names of other two are appearing in F.I.R., the veracity of Beeju Varsing's deposition certainly becomes doubtful and that leads us to believe that Masari Lakha was not there, or had not gone to the scene of offence, but was subsequently persuaded to say before the Court and support the case of the prosecution.

7. It is a matter to be noted that whenever the panchnama of the scene of offence or the seizure of weapons is drawn, the Police, in order to have support, tenders the same examining panchas, and if necessary, the Police Officer in whose presence, the panchnama is drawn. In this case, the panchnama of the scene of offence, though drawn, is not proved and exhibited. When the panchnama is not got exhibited, it would lead us to believe that had the same been produced on record and admitted in evidence, it would have certainly damaged the case of the prosecution and would have supported the defence. It may be asked here: what is the defence ?. According to the appellants, Ishu, the brother of Beeju and Bavuk, and son of the deceased was injured on 27th July 1985, and Ishu had lodged his complaint against the appellants before the Police, a copy of which is produced at Ex.41. According to Beeju and Bavuk, the appellants

were pressing much for compounding the case but the deceased and his sons were not willing to settle, on the contrary they were firm to proceed with the matter. The appellants wanted to screen themselves from the legal consequences, and it was possible if the deceased and his sons were done away with. They, therefore, formed an unlawful assembly and caused injuries so as to achieve their ill-goal. When such is the case, it was incumbent upon the prosecution to lead necessary and cogent evidence, even if we believe that the case in defence is not plausible. We would hence be extra cautious in placing reliance on the evidence of the above stated witnesses, keeping in mind the facts of absence of blood at the scene of offence, omission of Masri Lakha in F.I.R.; and non-production of Panchnama in evidence etc. discussed hereinabove.

8. We have noted a fact that Police Head Constable Ramkubhai Najbhai examined at Ex.53 has betrayed the point while stating about the Panchnama. According to him, the weapons seized were sealed, but the fact about sealing of the weapons was not mentioned in the panchnama. There is a reason to believe that, not to have the infirmity exposed before the Court and invite strictures pertaining to the investigation made, the panchnama has been suppressed from the Court.

9. Of course, Masri Lakha (Ex.30) has stated that when on hearing shouts, he reached the scene of offence, he questioned what happened and how, to which the deceased replied giving names of the appellants, that they assaulted him and caused injuries with the weapons they were having. Before us such oral Dying Declaration is overemphasized; but the evidence in that regard cannot be accepted because the presence of Masari Lakha is doubtful for the reason, we have hereinabove stated.

10. Mr.Divetia, learned APP, drew our attention to the report of the Chemical Analyzer going to show that on the stick and the spear, blood stains of Group 'B' were found.The Blood group of the deceased was 'B'. He therefore urged us to connect the appellants with the guilt keeping that circumstance in mind, because there was no explanation, how blood stains having Group 'B' came to be found on the stick and the spear, appellants nos. 3 and 4 were having. Apparently one would be inclined to accept the submissions made on behalf of the prosecution, but when the evidence is scrutinised with care, it appears that blood sample from the dead body was collected though not necessary when blood was found on the road near the school compound, and that circumstance

in the absence of any plausible explanation leads us to believe the defence that the prosecution misused the blood sample so as to falsely rope in the appellants.

11 Samantsinh Dipsinh, Police Head Constable (Ex.49) has also made it clear that Beeju, Taju, Ishu and others were the history-sheeters, and a note about the same in the Police Register has been made. The aforesaid persons are accused of the offences of causing damage or injury to person or properties, and also of the offences of robbery or dacoity and those relating to property and necessary notes in the Police Register are made. There is, therefore, coupled with the above discussed fact, a reason to believe that the case of the defence is to an extent plausible viz. because of enmity, some one assaulted and caused injuries to the above named witnesses and the deceased, but owing to enmity the injured were having an axe to grind they may have wrongly roped in the appellants.

12. In view of such facts on record, we do not find any reason to place any reliance on the testimony of the above stated four witnesses. Doubts that arise are not cleared by the prosecution leading necessary evidence. Rest of the witnesses have, no doubt, stated the fact they came to know subsequently or during the course of investigation they made, but their evidence is not at all helpful to connect any of the appellants with the charge levelled against them, and therefore, we do not discuss the evidence of those witnesses in detail. In our view, the learned Judge below has committed errors in appreciating the evidence and reaching logical conclusions against the appellants. The judgment and order convicting and sentencing the appellants are liable to be quashed and set aside and the appellants getting benefit of doubt are entitled to acquittal.

12. With the result, the appeal is allowed. The Judgment and order of the lower court convicting and sentencing the appellants as aforesaid are hereby quashed and set aside, and the appellants are ordered to be set at liberty forthwith, if not required in any other matters.

Muddamal be disposed of as per the lower court's order.
